FILE COPY 15L

FILED
NOV 15 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 443, 444, and 445

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

U.S. LAW PRINTING CO., PHONE LAKEVIEW 6581, CHICAGO, ILLINOIS

SUBJECT INDEX.

Page

Petition for Writ of Certiorari

Summary Statement of Matter Involved 1

Statement of Basis of this Court's Jurisdiction 18

Questions Presented 19

Reasons for Allowance of the Writ 19

Prayer for Writ 21

Brief in Support of Petition

Opinions Below 23

Jurisdiction 23

Statement of the Case and Questions Presented 23

Specification of Errors 23

Argument 25

Cases Cited.

Alexander v. Soloman, 15 S. W. 906 ..... 28, 34

Altgelt v. Alamo Natl. Bank, 98 Tex. 252 38

Andrews v. Brown, 10 S. W. (2d) 707 29

Arnold v. Southern Pine Lumber Co., 123 S. W. 1162.... ..... 28, 29, 34

Brine v. Ins. Co., 96 U. S. 627 25

Page

Burns Mortgage Co. v. Fried, 292 U. S. 487 25

Bush v. Gaffney, 84 S. W. 759 33

Cartledge v. Billalba, 154 S. W. (2d) 219 28

Chalk v. Collier, 208 S. W. 972 38

Chanowsky v. Friedman, 108 S. W. (2d) 752 29

Cities Service Oil Co. v. Dunlap, 308 U. S. 208 26

Clark v. Jones, 164 S. W. (2d) 62 35

Clearfield Trust Co. v. U. S., 318 U. S. 363 26

Continental National Bank v. Weems, 6 S. W. 802 29

Crites v. Prudential Ins. Co., 322 U. S. 408 30

Dallas Joint-Land Stock Bank v. Maxey, 112 S. W. (2d) 305 31

Daniel v. Henderson, 183 S. W. (2d) 242 36

Davila v. Salas, 178 S. W. (2d) 294 29

Dawson v. Kentucky Distilleries Co., 255 U. S. 288 25

DeEverett v. Henry, 3 S. W. 566 36

Dial v. Dial, 21 Tex. 529 35

Dodson v. Watson, 220 S. W. 771 ..... 28, 34

Dority v. Dority, 71 S. W. 951 35

Eaton v. Husted, 172 S. W. (2d) 493 ..... 28, 29, 30

Erie Railway Co. v. Tompkins, 304 U. S. 64 ....3, 18, 20, 21, 25

Fidelity Union Trust Co. v. Field, 311 U. S. 169 26

Fleck v. Baldwin, 172 S. W. (2d) 975 29

Fowler Commission Co. v. Charles Land & Co., 248 S. W. 314 38

Page

Garrett v. Moore-McCormack Co., 317 U. S. 238 26

Gaston & Thomas v. Dashiell, 55 Tex. 508 36

Graham v. Oakes, 32 S. W. (2d) 916 35

Griffin v. McCoach, 313 U. S. 498 26

Grote v. Service Finance Corp., 119 S. W. (2d) 136 29

Guaranty Trust Co. v. York, 326 U. S. 99 .....4, 20, 25, 26

Hemman v. Hemman, 251 S. W. 313 37

Hooks v. Bridgewater, 229 S. W. 1114 35

Huddleston v. Dwyer, 328 U. S. 232 26

Hudson v. Moonier, 304 U. S. 397 26

Ingenhuett v. Hunt, 39 S. W. 310 35

Jackson v. Smith, 254 U. S. 586 30

Klaxon Co. v. Stentor Mfg. Co., 313 U. S. 487 26

Kramer v. Sommers, 93 S. W. (2d) 460 30

Logan v. Logan, 156 S. W. (2d) 507 29

Long v. Collins, 12 S. W. (2d) 252 35

MacGregor v. State Mutual Life Ass. Co., 315 U. S. 280 26

Magruder v. Drury, 235 U. S. 106 30

Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357 25

Maxwell's Unknown Heirs v. Bolding, 36 S. W. (2d) 267 .....28, 34

McMullen v. Sims, 37 S. W. (2d) 141 35

Meredith v. Winter Haven, 320 U. S. 228 26

Merriman v. Russell, 39 Tex. 278 35

Miller v. Himebaugh, 153 S. W. 338 .....33, 35

Page

M. K. & T. Trust Co. v. Krumseig, 172 U. S. 351 25

Moore v. Illinois Central R. Co., 312 U. S. 630 26

Morhead v. New York *ex rel.* Tipaldo, 298 U. S. 587 25

Moseley v. Fikes, 126 S. W. (2d) 589 29

Murphy-Bolanz Land & Loan Co. v. McKibbon, 236 S. W. 78 35

Mutual Benefit Health and Accident Assn. v. Bowman, 304 U. S. 549 26

Nagle v. Von Rosenberg, 119 S. W. 706 ..... 33, 35

Nettles v. First National Bank, 168 S. W. (2d) 920 29

New York Life Ins. Co. v. Jackson, 304 U. S. 261 26

North Laramie Land Co. v. Hoffman, 268 U. S. 276 25

Palmer v. Trustees, 318 U. S. 109 26

Parrish v. Looney, 194 S. W. (2d) 419 29

Prudence Realization Corp. v. Geist, 316 U. S. 89 26

Richardson v. McCloskey, 261 S. W. 801 31

Rosenthal v. New York Life Ins. Co., 304 U. S. 263 26

Ruhlin v. New York life Ins. Co., 304 U. S. 202 ....3, 18, 20, 25

Russell v. Todd, 309 U. S. 280 .....25, 26

Scott v. Taylor, 294 S. W. 227 28

Seawell v. Greenway, 22 Tex. 691 28

Six Co.s of Cal. v. Joint Highway Dist. No. 13, 311 U. S. 180 26

Slay v. Burnett Trust, 180 S. W. (2d) 480, 187 S. W. (2d) 377 .....30, 33, 35

Smith v. Green, 243 S. W. 1006 33

Page

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 26

Spencer v. Pettit, 17 S. W. (2d) 1102 29

Stoner v. New York Life Ins. Co., 311 U. S. 464 26

Sullivan v. Fant, 160 S. W. 612 36

Sullivan, D., & Co. v. Ramsey, 155 S. W. 580 35

Texarkana v. Arkansas Gas Co., 306 U. S. 188 26

U. S. v. Carter, 217 U. S. 286 30

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 26

Vaughn v. Pearce, 153 S. W. 171 35

Ward v. Etier, 251 S. W. 1028 35

Watson v. Dodson, 143 S. W. 329 ..... 28, 34

West v. American T. & T. Co., 311 U. S. 223 26

White v. White, 25 S. W. (2d) 826 ..... 28, 34

Wichita Royalty Co. v. City Bank, 306 U. S. 103 26

Williams v. Green Bay & W. R. Co., 326 U. S. 549 ..... 20, 26

Witherspoon-McMullen Co. v. North Texas Trust Co., 212 S. W. 278 35

Page

STATUTES CITED

Rules of Supreme Court, 38(5)(b) 19, 39

Texas Revised Civil Statutes:

Art. 1288 ..... 11, 35, 40

" 3689 ..... 7, 31, 32, 40

" 3690 ..... 7, 31, 32, 40

" 3716 ..... 15, 16, 42

" 3995 ..... 11, 35, 41

" 7425b-12 ..... 12, 13, 36, 41

28 U. S. C. A. 725 ..... 4, 18, 19, 20, 21, 25, 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. ....., ..., and .....

EDWIN K. ATWOOD and ALICE B. ATWOOD,
Petitioners,

vs.

ROBERT J. KLEBERG, JR., CAESAR KLEBERG, RICHARD MIFFLIN KLEBERG, JOHN D. FINNEGAN, SAMUEL G. RAGLAND and RICHARD KING, JR., individually and as Trustees under the Last Will and Testament of Henrietta M. King, Deceased, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI.

To The Honorable, The Supreme Court Of The United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioners, Edwin K. Atwood and Alice B. Atwood, praying for a Writ of Certiorari in each of these three appeals to review a single decision of the United

States Circuit Court of Appeals for the Fifth Circuit affirming three decrees entered in the District Court of the United States for the Southern District of Texas, respectfully submit:

These cases involve a Texas trust created by the Will of Henrietta M. King (R. 33-60), who was the owner of the famous KING RANCH comprising One Million Acres in southern Texas. Petitioners are two grandchildren of Mrs. King, who died on March 31, 1925, and her husband, Captain Richard King, who died in 1885. Respondents are the trustees under the Will (together with certain of the beneficiaries thereunder.)

The trust created by Mrs. King's Will was limited to a ten-year period from her death, the trust thus terminating on March 31, 1935 (R. 33-60). Petitioners, who were named as beneficiaries of the trust in the Will, brought an accounting action to settle the trustees' accounts covering the entire period of the trusteeship (R. 116). The trial court's jurisdiction in the accounting action was based upon diversity of citizenship between petitioners, who are both residents of Illinois, and the respondent trustees, all of whom are residents of Texas (R. 8-9). The two supplemental proceedings covering final settlement of the Trust Estate were also based upon diversity of citizenship (11717, R. 13; 11704, R. 11).

The trial court appointed a Special Master on May 2, 1936, with authority *only* to pass upon *questions and issues of fact* (R. 116). The Master held hearings between June, 1936 and September 1, 1939, and filed his "Findings of Fact" on November 12, 1942, containing many *conclusions of law*, as well as numerous findings of fact (R. 355-477).

On August 11, 1944, the trial court rejected all of the

Master's *conclusions of law* (R. 526). At the same time, the trial court adopted *en masse* all of the Master's findings of fact, and on September 7, 1944, entered a final decree against petitioners approving *in toto* the respondent trustees' accounts (R. 316).

Petitioners then appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the trial court on July 2, 1947 (R. 1003-17). Mr. Justice Waller filed a separate opinion, dissenting in part from the majority opinion (R. 1016-7). Petitioners thereupon filed their petition for rehearing (R. 1019-1101), which was denied on August 21, 1947 (R. 1102).

The Circuit Court's majority opinion was apparently grounded upon the utterly erroneous doctrine, which was never the law in Texas, not only that the "burden of proof" in an ordinary accounting action such as this, brought by beneficiaries against their trustees to wind up the affairs of the Trust Estate after its termination, is upon the beneficiaries, but also that the beneficiaries must go even further and bear the burden of proving "fraud" or "overreaching" on the part of the trustees (R. 1007-9).

Moreover, the Circuit Court failed to apply the Texas law that trustees may not directly benefit themselves, or their wives and families, by their own transactions with their Trust Estate, no matter what exculpatory provisions the trust instrument contains, it being a well-settled rule of Texas law that a trustee can make no profit for himself out of his trust.

Under the well-considered decisions of this Court, starting with *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and con-

tinuing down to the recent decision in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, it was the duty of the District and Circuit Courts to apply the Texas law of trusts to the facts as found by the Master and confirmed by the trial judge in this case. This the District and Circuit Courts failed to do.

The District and Circuit Courts also failed to apply, and refused to be bound by, the Texas Revised Civil Statutes, in defiance of the Rules of Decision Act (Section 725 of the Judicial Code (28 U. S. C. A. 725)), and the many cases, decided by this Court, both before and after the *Erie Railway Co.* case, requiring the Federal Courts to follow and be bound by State statutes when applicable to the controversy before them.

We have selected several of the most flagrant breaches of trust by the trustees to illustrate the failure of the District and Circuit Courts to apply the Texas statutes and the Texas law of trusts in this case, such breaches of trust involving losses to the Trust Estate of more than Two Million Dollars.

I.

The Trustees Paid $300,000 To Three Of Their Own Number As "Executors' Fees."

The Master found (R. 356) and the trial judge confirmed (R. 526) that Mrs. King died on March 31, 1925, and that, following the admission of her Will to probate on May 6, 1925,

> "*The* [*seven*] *trustees immediately undertook the performance of said trust and continued to act as such until March* 31, 1935, at which time they partitioned the principal assets of the estate, . . ." (R. 356).

Among the seven testamentary trustees were Robert J. Kleberg, Caesar Kleberg, and Richard King, Jr., who were also named as *independent executors* in the Will (R. 356). The seven trustees paid to these three of their own number, who were also named as *executors*, the sum of $300,000 as "executors' fees" (R. 370).

The Master found (R. 370) and the trial judge confirmed (R. 526) that "the cash receipts [of the Trust Estate] during the trust period amounted to $18,457,356.92 (Def. Ex. 182), and the cash disbursements amounted to approximately the same sum." The fact that all of these funds *were received and disbursed only by the trustees, and not by the executors,* was conclusively established before the Master by the evidence, including the letter written by J. K. Wells, attorney for the trustees, to petitioners' counsel in 1928 (Pl. Ex. 674), stating that the executors had filed an inventory, appraisement and list of claims under the Texas statute but had filed no reports thereafter. The crucial sentence in the letter reads:

> "*In accordance with the terms in the Will, as soon as the Will was probated the Trustees took over the property and have been managing it and holding it as a trust ever since.*" (Italics added.)

The fact that none of the cash receipts were paid to, and none of the cash disbursements were made by, *the executors, as distinguished from the trustees,* is also conclusively established by Mr. Justice Waller's dissenting opinion (R. 1017). After quoting that part of the Will which provided "that, no other action shall be had in the County Court or in any court having jurisdiction in matters of probate, in relation to my estate or the settlement thereof, than the probating and recording of this, my Last Will, and the return and filing of an Inventory and Appraisement, and

List of Claims, of my Estate" (R. 1016), Mr. Justice Waller concluded:

> "From the foregoing, therefore, the duties of the executors were restricted to probating and recording the will, filing an inventory and appraisement, and list of claims. They were not required to render any accounting nor to give any bond. *The operation and management of the estate was entirely in the hands of the trustees*" (R. 1017). (Italics added.)

Mr. Justice Waller also quoted the provisions of the Will limiting the trustees' compensation to ten per cent (10%) of the net revenues of the Trust Estate (R. 1016). (This compensation the Master and the trial court found had been paid in full under the description of "commissions" of $111,752.76, and "salaries" as employees of the Trust Estate of $297,448.02) (R. 336, 360, 366, 526). He then stated (R. 1017):

> "Moreover, in the Federal estate tax return which was sworn to by the executors, they only claimed as fees to the executors the sum of $110,394.39. The addition of the sum of $189,605.61 seems to be somewhat of an afterthought. *I think that the fees allowed the executors are grossly excessive in view of the provisions of the will, the narrowness of their duties, and the compensation received by them as trustees and as employees of the Trust Estate.* I would, therefore, remand the case solely for the purpose of having the [District] Court below fix the fees of the executors *at an amount that would be but nominal* in comparison to the fees which the trustees agreed upon and which the Court allowed to stand." (Italics added.)

Mr. Justice Waller's dissenting opinion, therefore, is based upon the proposition that, since *the executors* had only nominal duties under Mrs. King's Will and, since *only the trustees* operated and managed the "entire" estate *and the executors did not do so,* the so-called "executors' fees" of $300,000 were "grossly excessive."

But Mr. Justice Waller, as well as the majority of the Circuit Court, wholly ignored Articles 3689 and 3690 of the Texas Revised Civil Statutes, which clearly provide that Texas executors are not entitled to any "executors' fees" *except upon moneys which "they may actually receive in cash, and . . . they may pay out in cash in the course of their administration"* (Article 3689). The Texas Statute also specifically deprives Texas executors of the right to receive any "executors' fees" upon "any cash which was on hand at the time of the death of the testator or intestate," or "money realized from the sale of property and the paying out of the proceeds in satisfaction of the debt" of the deceased, or "for paying out money to the heirs and legatees as such" (Article 3690). These Articles 3689-90 are quoted in the Appendix to our Brief below.

Moreover, the Texas decisions interpreting Articles 3689-90 of the Texas Revised Civil Statutes clearly hold that unless Texas executors can qualify for fees thereunder, *they are not entitled to any executors' fees.* The cases are cited in our Brief below.

Under the clear facts as found by the Master and confirmed by the trial judge, *and also confirmed by Mr. Justice Waller,* therefore, the seven trustees, who exclusively operated and managed the Trust Estate from its inception to its termination, were unjustified in paying $300,000 as "executors' fees" to three of their own number who, as executors, were not qualified to receive one penny thereof under Articles 3689-90 of the Texas Revised Civil Statutes.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts to this breach of trust.

II.

The Trustees Expended $451,115.81 For "New Improvements" on Mrs. Kleberg's Lands, And $91,499.40 For "New Improvements" On Robert J. Kleberg, Jr.'s Lands.

The Master found (R. 386) and the trial judge confirmed (R. 526, 531) that the trustees "expended the sum of $451,115.81 for the purpose of improving the 174,791.36-acre tract owned by it *and the* 30,439.23 *acres leased by it from Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Ranch," which was not owned by the Trust Estate;* and that the trustees also expended $91,499.40 "for new improvements" *on the land owned by Robert J. Kleberg, Jr., which also was not owned by the Trust Estate* (R. 385-6, 526). Mrs. Alice G. K. Kleberg was the wife of one trustee (Robert J. Kleberg), and the mother of two other trustees (Robert J. Kleberg, Jr., and Richard M. Kleberg) (R. 45).

The Texas courts have uniformly held that Texas trustees may not improve their individually-owned real properties with trust funds, and that Texas trustees may not expend trust funds for their own individual benefit by making permanent "new improvements" on lands privately owned by them or their spouses, without thereby breaching their trust.

The District and Circuit Courts failed to apply the Texas law of trusts to these breaches of trust.

III.

The Trustees Paid The "Living Expenses" Of Mrs. Alice G. K. Kleberg And Her Family, Servants, Guests And Friends From The Trust Estate.

The Master found (R. 360-1, 394-5) and the trial court confirmed (R. 526) that the trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg and her family, servants, guests and friends with funds from the Trust Estate. The Master failed to find the amount in dollars of these "living expenses" because, he found, "it is not possible to segregate" this cost from the other expenses of the Trust Estate (R. 394-5).

The Master further found (R. 362, 364-5) and the trial judge confirmed (R. 526) that the trustees also paid part of the "living expenses" of three of the trustees (Richard M. Kleberg, Richard King, and Robert J. Kleberg, Jr.), while all of them were living in their own homes on their own or on Mrs. Kleberg's real estate.

The evidence showed that the "living expenses" of Mrs. Kleberg and her family, servants, guests and friends were included in accounts totaling over $775,242.62 (Pl. Ex. B, C, D) and that the "living expenses" of the three trustees and their families, servants, guests and friends were merged in accounts totaling in excess of $250,000 (Pl. Ex. B, C, and D). It was from these accounts, exceeding the sum of $1,000,000, that the Master found these "living expenses" could not be "segregated." Included in other expense accounts were such items as oil paintings purchased with trust funds totaling in excess of $3,500, which were hung on the walls of Mrs. Kleberg's Santa Gertrudis Ranch house (Master's Ex. 152). Under Texas law, the burden was on the trustees to keep accurate and "segregatable" accounts.

Mr. Justice Waller in his dissenting opinion (R. 1016) quotes *verbatim* the "compensation" clause (Article Tenth) of Mrs. King's Will, which definitely and postively forbade the trustees to pay themselves any "compensation" by way of "living expenses." (R. 56).

Under Texas law, Mrs. King had the undeniable right to limit the "compensation" to be received by her trustees from her Trust Estate. There was certainly no provision in the Will authorizing the payment of Mrs. Kleberg's "living expenses" as such.

The trustees attempted to justify the payment of Mrs. Kleberg's "living expenses" between 1925 and 1935 as added "salary" paid to her husband, Robert J. Kleberg (who died in 1932), for his services as an employee of the trustees; but petitioners offered in evidence Robert J. Kleberg's Federal income tax returns from 1925 to 1932, which showed conclusively that he had not claimed that these "living expenses" paid by the trustees constituted income to him for his services from the Trust Estate during any of these years (Pl. Ex. 552-9; Def. Ex. 455-462). Of course, between 1932 and 1935, when Robert J. Kleberg was no longer living, the payment of his widow's "living expenses" could not possibly have been part of his "salary" or other "compensation" *on any conceivable theory.* These "living expenses" for this limited period exceeded a Quarter of a Million Dollars.

Petitioners also offered in evidence the Federal income tax returns filed by the trustees themselves from 1925 to 1935, showing that the trustees had excluded the "living expenses" of Mrs. Kleberg and her family as claimed deductions for Federal income tax purposes (Pl. Ex. 34-44).

The District and the Circuit Court failed to apply the Texas law of trusts precluding trustees from paying their own or their families' "living expenses," regardless of their "good faith" or any of the powers granted them under the Will.

IV.

The Trustees Paid $480,855.13 To Robert J. Kleberg, Jr. As "Rental" On Lands Owned By Him.

The Master three times found (R. 385-6, 389) and the trial judge confirmed (R. 526, 530) that *the trustees* (*not* Mrs. King) "leased" the privately owned lands of Robert J. Kleberg, Jr., known as the Encino and Stillman Ranches, under a written lease upon the Encino Ranch and under an oral lease on the Stillman Ranch, and paid him so-called "rental" therefor totaling $480,855.13.

The District and Circuit Courts failed to apply either the Texas Revised Civil Statutes (Articles 1288 and 3995) providing that "oral leases" of lands for more than one year are not enforcible, or the Texas law of trusts whereby trustees may not lease their own lands to their Trust Estate at a "rental" profit of nearly Half a Million Dollars. Articles 1288 and 3995 are quoted in the Appendix.

The Master also found (R. 393) and the trial judge confirmed (R. 529, 590) that the trustees paid $120,000 of so-called "rental" to Mrs. Alice G. K. Kleberg under a written lease (Pl. Ex. 178; Def. Ex. 210) made by Mrs. King on January 1, 1919 but renewed by the trustees each year during the ten-year trust period from 1925 to 1935, which lease covered and included the Palo Alto Farms comprising 8,111.9 acres owned by Mrs. Kleberg in 1919, but which lands were never in the possession of the trustees because

they had been given by Mrs. Kleberg to her son, Robert J. Kleberg, Jr., and had been sold by him to third persons *before Mrs. King's death.* It was from the proceeds of this sale that Robert J. Kleberg, Jr. had purchased the very same Encino and Stillman Ranches upon which the trustees later paid him $480,855.13 as alleged "rental" during the trust period. Thus the trustees paid "double" rental (1) of $480,855.13 to Robert J. Kleberg, Jr. upon the Encino and Stillman Ranches and (2) of $120,000 to his mother, Mrs. Kleberg, upon the Palo Alto Farms which he sold in 1924, using the proceeds of sale to purchase the Encino and Stillman Ranches, *before Mrs. King died.*

The District and Circuit Courts failed to apply the Texas law of trusts holding that trustees may not make a personal profit, either by leasing their own individually owned lands to the Trust Estate or in any other manner, without violating their "duty of loyalty" to their beneficiaries, and thus breaching their trust.

V.

The Trustees Purchased Real Property From A Corporation Wholly Owned By Two Trustees.

The Master found (R. 369, 413) and the trial court confirmed (R. 526) that the trustees purchased real property called the "Kimmel Farm" for $13,904.27 from Kingsville Land & Investment Company, a Texas corporation, whose entire capital stock was owned by two trustees (Robert J. Kleberg and Caesar Kleberg).

Under Texas Revised Civil Statutes (Article 7425 b-12), enacted in 1945, a trustee may not purchase his individually owned property, or enter into any such transaction in in which he has a personal interest. Article 7425 b-12

is quoted in the Appendix. Under the Texas law of trusts, it has always been held that trustees may not purchase with trust funds real property from themselves or from a corporation wholly owned or controlled by them without breaching their trust.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts to the foregoing breach of trust.

VI.

The Trustees Made Charitable, Political, And Wedding Gifts Of Trust Funds.

The Master found (R. 3, 198) and the trial court confirmed (R. 526, 531) that Mrs. King devised two city lots to the Congregation of the Presbyterian Church, South, of Brownsville (R. 34), but that she had adeemed the devise by the sale of the lots in her lifetime. Mrs. King in her Will also directed her trustees *themselves* (*not* the devisee) "out of the Funds in their hands" to expend "not to exceed the sum of $5,000," for the purpose of erecting a residence "on said Lots." The trustees gave to the Treasurer of the church $6,500 "in lieu of" the adeemed devise, plus $5,000 of trust funds, which $5,000 could not have been used to erect the residence because of the ademption.

The Master also found (R. 401, 405) and the trial judge confirmed (R. 526) that the trustees made "gifts" or "donations" of $6,729.30 to the National Democratic Committee (1) to elect R. S. Sterling and Clinton Small as Governors of Texas, and (2) to defeat the election of Herbert Hoover as President of the United States.

The Master also found (R. 402) and the trial judge confirmed (R. 526) that the trustees paid $2,500 from the Trust Estate to Robert J. Kleberg, Jr. at the time of his wedding in 1926 "in response to his demand for additional compensation for his services"; but Richard King and Richard M. Kleberg, two of the trustees, admitted in their sworn testimony that this $2,500 of trust funds was paid to Robert J. Kleberg, Jr. as a "wedding present" or wedding "gift" (M. R. 8207, 8209); and the actual Voucher 1840 dated April 7, 1926 (Pl. Ex. 218), offered in evidence by petitioners, shows that the sum of $2,500 was paid to Robert J. Kleberg, Jr. as a "gift" and was charged to "donations" on the trustees' books.

The District and Circuit Courts disregarded the Texas statutes and the Texas law of trusts holding that trustees may not "give away" trust assets, and particularly that trustees may not make "wedding gifts" to themselves from this Trust Estate.

VII.

The Trustees Failed to Collect The Indebtedness Of Richard King, Sr. To The Trust Estate Aggregating $306,209.33.

The Master found (R. 423, 467) and the trial court confirmed (R. 526) that at the inception of the trust period the Estate of Richard King, Sr. (son of Captain King) was "indebted to Mrs. King on notes receivable aggregating $21,000, and on open account in the sum of $255,209.33, exclusive of interest," together with $30,000 advanced by Mrs. King for Richard King, Sr. Estate's account, making a total indebtedness to Mrs. King at her death, and therefore to her trustees, aggregating $306,209.30. This claim for $306,209.30 against the Estate of Richard King, Sr. was thus an asset of the Trust Estate.

The Estate of Richard King, Sr. descended, in an insolvent condition, to Richard King, Jr. (grandson of Captain King), one of Mrs. King's trustees, and his two sisters, early in the trust period, as the Master found (R. 423-4). The evidence showed that *at least two-thirds of this indebtedness was fully collectible at Mrs. King's death in* 1925, and that *the entire amount* could have been collected by the end of the trust period in 1935 (M. R. 6108-9, 6113, 6525).

Neither the District nor Circuit Courts applied the Texas law of trusts to the trustees' failure to collect this indebtedness, or such part of it as was collectible, it being a breach of trust for Texas trustees not to collect all claims due the Trust Estate, especially when such indebtedness is due from one of the trustees themselves, or is collectible from property held by one of the trustees.

VIII.

The Trustees Failed To Collect The Note Receivable Of Robert J. Kleberg, Sr. And Others For $196,587 Held By The Trust Estate.

The Master found (R. 459) and the trial court confirmed (R. 526) that at her death Mrs. King held the (renewal) note receivable of Robert J. Kleberg and others in the principal sum of $196,587 dated November 4, 1924, less than five months before her death in 1925 (Pl. Ex. 122).

Based entirely upon oral testimony given in defiance of the "Texas Dead Man's Statute" (Article 3716 of the Texas Revised Statutes), the Master found (R. 459-462) and the trial court confirmed (R. 526) that Robert J. Kleberg's obligation on this renewal note executed on November 4, 1924 *had been released by matters taking place prior*

to the time that Robert J. Kleberg and others signed the $196,587.00 *renewal note on November* 4, 1924. Article 3716 is also quoted in the Appendix.

The District and Circuit Courts failed to rule that the oral testimony given in defiance of the Texas "Dead Man's Statute" (Texas Civil Revised Statutes, Article 3716), relating to matters taking place prior to the giving of the renewal note by Robert J. Kleberg and others, payable to Mrs. King shortly before her death, which note comprised one of the assets of her Trust Estate, constituted no defense to the trustees' breach of trust for failure to collect such note receivable during the trust period.

IX.

The Trustees Paid The Operating Expenses Of And Purchased Property From Kleberg Town & Improvement Company, A Corporation, One-Half Of Whose Stock Was Owned By Alice G. K. Kleberg.

The Master found (R. 416-7) and the trial court confirmed (R. 526) that Mrs. Alice G. K. Kleberg owned one-half of the entire capital stock of Kleberg Town & Improvement Company, a Texas corporation; that the trustees "paid all of the rent and telephone expenses for the office and telephones" charged to, and "used by" this company, which aggregated $42,273.39; and that the trustees purchased certain real estate known as the "Worrel House" for $2,561.21 from this company.

The District and Circuit Courts failed to apply the Texas statutes and the Texas law of trusts holding that trustees may not purchase properties from themselves or from corporations owned or controlled by them, and may not use trust funds for the benefit of themselves or a corporation owned or controlled by them or by their spouses.

X.

The Trustees Failed To Collect From Mrs. King's Partners In The Kleberg Bank, A Co-Partnership, Their Ninety Per Cent Share Of Losses Aggregating $499,101.13 Under Their Right To Contribution From The Other Partners.

The Master found (R. 406-10) and the trial court confirmed (R. 526) that Mrs. King at the time of her death was a co-partner, to the extent of only a ten per cent (10%) interest, in the Kleberg Bank, a co-partnership doing business in Kingsville, Texas; and that the trustees of her Trust Estate paid from trust funds one hundred per cent (100%) of the losses of the partnership aggregating $499,101.13.

The Master further found (R. 409-10) and the trial judge confirmed (R. 526) that at the time the Trust Estate suffered this loss of $499,101.13, the trustees had *a right of contribution* for the other ninety per cent (90%) of this loss against the other bank partners, three of whom were also trustees of Mrs. King's Trust Estate, but that no part of this sum was ever actually collected by the trustees. The Master found (R. 409-10):

> "In December, 1934, most of the members of the [Kleberg Bank] partnership were unable to make any contribution toward the losses sustained by the estate. *Some recovery, however, could have been had, particularly from Caesar Kleberg, Richard Kleberg and Robert. J. Kleberg, Jr. No action was taken by the executors and trustees to secure contributions from the other members of the firm.*" (Italics added.)

Under Texas law (and also under Article 14 of the partnership articles of the Kleberg Bank), Mrs. King's death terminated the partnership relation, as though she had voluntarily resigned on the date of her death (Pl. Ex. 64,

Def. Ex. 41). The Kleberg Bank's insolvency was actually caused by bank loans aggregating $832,030.53, which loans were made by the bank's partners to themselves (including several of Mrs. King's trustees), almost all of which loans were created after Mrs. King's death in 1925, as shown by the Federal Reserve Bank Examiners' written Report (Pl. Ex. 65, Def. Ex. 192; R. 407).

The District and Circuit Courts failed to apply the Texas law requiring the trustees to collect the claims of the Trust Estate, and especially such parts as were found by the Master to be collectible from themselves.

Mrs. King's trustees committed other breaches of the trust law of Texas involving substantial losses to the Trust Estate, as described in the petition for rehearing filed in the Circuit Court (R. 1019-1101).

STATEMENT OF BASIS OF THIS COURT'S JURISDICTION.

The decision of the Circuit Court of Appeals for the Fifth Circuit in this case fails to apply the statutory and trust law of Texas applicable to the compensation of Texas executors and to the administration of Texas trust estates, as required by federal statute (the Rules of Decision Act, Section 725 of the Judicial Code, 28 U. S. C. A. 725) and the Federal cases construing the same, and as required by the decisions of this Court embodied in *Erie Railway* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and subsequent decisions under which the District Courts and the Circuit Court of Appeals must apply the state statutes and state law to diversity cases brought in the Federal Courts.

Moreover, Rule 38 (5) (b) of this Court specifically states that a writ of *certiorari* may properly be granted "where a Circuit Court of Appeals has decided a federal question is a way probably in conflict with applicable decisions of this Court." As we show by the Argument below, this Court has consistently granted writs of *certiorari* where, as in the case at bar, the District and Circuit Courts have decided a case in plain violation of the state statutes and state law applicable thereto.

QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals for the Fifth Circuit apply Articles 3689-90 of the Texas Revised Civil Statutes in approving the payment by Mrs. King's seven testamentary trustees of $300,000 as "executors' fees" to three of their own number who were also named as independent executors in her Will?

2. Did the Circuit Court of Appeals for the Fifth Circuit apply the Texas statutes and the Texas law of trusts to the expenditures by the trustees of trust funds from their Trust Estate to make "new improvements" on lands owned by themselves or their spouses and for other purposes benefiting the trustees personally, and to the trustees' failure to collect the claims of the Trust Estate against themselves and others, as well as in other matters above mentioned connected with the administration of the Trust Estate created under Mrs. King's Will?

REASONS FOR THE ALLOWANCE OF THE WRIT.

Under the Federal Rule of Decisions Act (Section 725 of the Judicial Code, 28 U. S. C. A. 725) and the decisions

of this Court construing it, and the many decisions of this Court applying the rule first enunciated in *Erie Railway Co.* v. *Tomkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, the Federal Courts are mandatorily required to apply the statutory and decision law of the several states, including the State of Texas, to controversies which, if decided in the state courts, would have been governed by the state statutes and decided cases applicable thereto.

Starting with the *Erie Railway Company* and *Ruhlin* cases, and continuing down to *Guaranty Trust Co.* v. *York,* 326 U. S. 99, and *Williams* v. *Green Bay & W. R. Co.,* 326 U. S. 549, this Court has consistently granted writs of *certiorari* where the District and Circuit Courts have failed to apply state law to controversies in diversity cases which would have been determined in the state courts under such state law. The cases are cited in the Argument below.

It amply appears that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is directly in conflict with Section 725 of the Judicial Code and with the decisions of this Court requiring the Circuit Court to apply the Texas statutes and the Texas law of trusts to the administration of Mrs. King's Trust Estate by her testamentary trustees.

Neither the District Court nor the Circuit Court has applied the Texas statutes and the Texas law of trusts in this case, under which the trustees of Mrs. King's Trust Estate have been guilty of breaches of trust aggregating in excess of Two Million Dollars. The litigants come from widely separated parts of the country. As stated by this court in the *Guaranty Trust Company* case (p. 111):

"Diversity jurisdiction [in the Federal Courts] is

> founded on *assurance to non-resident litigants of [Federal] courts free from susceptibility to potential local bias.* The Framers of the Constitution, according to Marshall, entertained 'apprehensions' *lest distant suitors be subjected to local bias* in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. *Bank of the United States* v. *Deveaux,* 5 Cranch. 61, 87. And so Congress afforded out-of-State litigants another tribunal, not another body of law." (Italics added.)

Petitioners are thus "out-of-State litigants" who are entitled to the protection of the Federal Courts in this case. They believe they will not receive this protection, except at the hands of this Court.

The question here involved is important. If the clear language of the Rules of Decision Act (Section 725 of the Judicial Code) and the rule of this Court enunciated in the *Erie Railway Company* and succeeding cases, requiring the Federal Courts in this case to apply the Texas statutory and trust law, are to be overthrown, it should only be by a square decision by this Court to that effect.

Moreover, the King Ranch trustees are persons of great wealth and prominence. If they can flout the Federal Statutes and the Federal Law as determined by this Honorable Court, as well as the Statutes and Laws of the State of Texas, it will be hard for ordinary litigants to believe that the Federal Courts are doing their duty to see that non-residents of Texas receive fair and impartial justice.

WHEREFORE, petitioners pray that a Writ of Certiorari issued under the Seal of the Court, directed to the United States Circuit Court of Appeals for the Fifth

Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court. And petitioners also pray for such other, further or different relief as may seem proper.

And these petitioners will ever pray, etc.

Edwin K. Atwood and Alice B. Atwood, *Petitioners,*

By BRADY COLE,
Counsel for Petitioners.

THOMAS H. FISHER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

There were no formal opinions in the District Court, although the trial judge filed his "Findings of Fact and Conclusions of Law" in the accounting action (R. 522) and in the settlement proceedings (11717, R. 386). The majority and dissenting opinions of the Circuit Court of Appeals (R. 1003-17) have not yet been reported.

JURISDICTION

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fifth Circuit on July 2, 1947 (R. 1003), and petition for rehearing was denied on August 21, 1947 (R. 1002). Writs of Certiorari are asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, Section 240, 36 Stat. 1157, as amended February 13, 1925, c. 229, Section 1, 43 Stat. 938).

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

For a statement of the case and questions presented, see this Petition, pages 1 to 19 above.

SPECIFICATION OF ERRORS.

It is submitted that the Circuit Court of Appeals for the Fifth Circuit erred:

1. In affirming the decree of the District Court.

2. In holding that the testamentary trustees of Mrs.

King's Trust Estate did not breach their trust (a) in paying $300,000 to three of their own number as independent executors on account of so-called "executors' fees"; (b) in expending $451,115.81 and $91,499.40 in making "new improvements" on lands not owned by the Trust Estate, but owned by the trustees and their spouses individually; (c) in paying $1,000,000 or more for the "living expenses" of Mrs. Kleberg and the trustees; (d) in paying $480,855.13 as "rental" to Robert J. Kleberg, Jr.; (e) in purchasing land from Kingsville Land & Investment Company; (f) in making "gifts" and "donations" of trust funds; (g) in failing to collect any part of the indebtedness of $306,209.33 due the Trust Estate from the Estate of Richard King, Sr.; (h) in failing to collect the $196,587 note of Robert J. Kleberg, et al.; (i) in paying the expenses of Kleberg Town & Improvement Company; and (j) in failing to enforce against the other partners the trustees' right of contribution to 90% of the losses to the Trust Estate aggregating $499,101.13 paid with trust funds upon the debts of the Kleberg Bank, a co-partnership, and in other respects.

3. In failing to apply the Texas statutes and Texas law of trusts to the accounting by the trustees and the settlement of Mrs. King's Trust Estate.

4. In not reversing the decrees of the District Court.

ARGUMENT

I.

That the United States District Courts and the United States Circuit Courts of Appeals are required to apply the Texas statutes and the Texas law of trusts to the administration of the Trust Estate created under Mrs. King's Will is now definitely established, not only by the Rule of Decisions Act embodied in Section 725 of the Judicial Code (28 U.S.C.A. 725) and the cases construing that Act, but also by the rule laid down by this Court in *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, and the many cases affirming that rule in this Court since those cases were decided in 1938.

For cases holding that the Federal Courts sitting in diversity cases are bound by state statutes, and the decisions of the state courts construing them, we cite: *Brine* v. *Ins. Co.*, 96 U. S. 627; *M. K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 351; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487; *Marine Bank* v. *Kalt-Zimmers Co.*, 293 U. S. 357; *Morhead* v. *New York ex rel. Tipaldo*, 298 U. S. 587; *Russell* v. *Todd*, 309 U. S. 280; *Guaranty Trust Co.* v. *York*, 326 U. S. 99.

Moreover, this Court has now definitely established the further rule that state law, even if not embodied in state statutes, shall be applied to all controversies in diversity cases in the Federal Courts. This is the rule laid down in *Erie Railway Co.* v. *Tomkins*, 304 U. S. 64, and *Ruhlin* v.

New York Life Ins. Co., 304 U. S. 302, and subsequent decisions.

Indeed, this Court has uniformly granted writs of *certiorari* where, as in the case at bar, it appears beyond reasonable doubt that the District and Circuit Courts have failed to apply the state law as embodied in the state court decisions, even though no state statute is involved. We cite: *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261; *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263; *Hudson* v. *Moonier*, 304 U. S. 397; *Mutual Benefit Health and Accident Assn.* v. *Bowman*, 304 U. S. 549; *Wichita Royalty Co.* v. *City Bank*, 306 U. S. 103; *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188; *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208; *Russell* v. *Todd*, 309 U. S. 280; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Six Co.s of Cal.* v. *Joint Highway Dist. No.* 13, 311 U. S. 180; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498; *MacGregor* v. *State Mutual Life Ass. Co.*, 315 U. S. 280; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 238; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Palmer* v. *Trustees*, 318 U. S. 109; *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363; *Meredith* v. *Winter Haven*, 320 U. S. 228; *Huddleston* v. *Dwyer*, 328 U. S. 232; *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549.

In many of the foregoing cases *the sole ground* for the allowance of the writ of *certiorari* was the failure of the Federal Courts to apply the state law, precisely as in the case at bar.

II.

As indicated in the Petition above (p. 3), the Circuit Court's majority opinion appears to be based upon the utterly erroneous doctrine, which was never the law of Texas, that the "burden of proof" in an ordinary accounting action to wind up a trust such as this is upon the beneficiaries (R. 1007-9). The majority opinion even goes farther and states that the beneficiaries must make a showing that there has been "fraud" or "over-reaching" on the part of the trustee (R. 1009). We quote from the Circuit Court's majority opinion (R. 1007):

> "Plaintiffs treated this case below, and they treat it here, as though the mere filing of their [accounting] suit put the trustees in the wrong and on the defensive, put upon them not only the burden of showing what they did in the course of their management of the trust estate and in respect of its partition, but that the plaintiffs' charges were false and unfounded. That this is not so is so well settled as not to require the citation of authority. *The trustees have in their support the general principle that it will be presumed that persons charged with the performance of a duty have discharged it fairly and in accordance with their commission until evidence is introduced which overthrows this presumption.* More than this, the will makes plain the intent and purpose of the testatrix to leave to the discretion of her trustees, except where the will made express provision otherwise, *the time and manner* of the doing of the things she had charged them with doing. Furthermore, the will expressly authorized them, subject only to the limitation that they must not act inconsistently with it, to act, with respect to the terms of the will and the power conveyed, *as though they were the owners of the property* she had conveyed to them in trust. All questions then of the correctness of the accounting and the partition must be approached and examined as though Mrs. King, herself, had made them *under the will,* and they both must be sustained

and approved *unless a showing is made that there has been fraud, over-reaching* or failure to comply with the will's plain terms. In view then of the explicit language of the will, and that all of the others, except plaintiffs, were satisfied with the conduct of the trusteeship and had accepted the partition, *the burden rested on plaintiffs to show that they had been deprived by the trustees of benefits conferred by the will.* In the light of these considerations and of the full and detailed nature of the accounting made by the trustees, we reject appellants' primary claims both as to the partition and the accounting, that plaintiffs were entitled to a decree for failure of defendants to disprove the charges plaintiffs made." (Italics added.)

Under the Texas law of trusts from the earliest times (as well as under the law of all other states), it has been established beyond doubt or question that the burden of proof, in an accounting action such as this to wind up the affairs of a trust estate after its termination, is exclusively upon the trustees and not upon the beneficiaries. *Alexander* v. *Soloman,* 15 S. W. 906; *Maxwell's Unknown Heirs* v. *Bolding,* 36 S. W. (2d) 267; *White* v. *White,* 25 S. W. (2d) 826; *Arnold* v. *Southern Pine Lumber Co.,* 123 S. W. 1162; *Seawell* v. *Greenway,* 22 Tex. 691; *Watson* v. *Dodson,* 143 S. W. 329; *Dodson* v. *Watson,* 220 S. W. 771; *Eaton* v. *Husted,* 172 S. W. (2d) 493. (And the same burden of proof rests upon Texas executors and administrators, as well as trustees. *Cartledge* v. *Billalba,* 154 S. W. (2d) 219; *Scott* v. *Taylor,* 294 S. W. 227.)

The majority opinion of the Circuit Court speaks (R. 1007-8) of the trustees having a presumption in their support that they have performed their trust duties properly "until evidence is introduced which overthrows this presumption."

The only Texas cases in which a "presumption" is indulged in relation to the actions of trustees are cases where the beneficiary seeks to show that certain trust assets have continued to remain in the hands of the trustee who had previously received them up to the time of the trustee's death or insolvency; and in these instances *the presumption is in favor of the beneficiary and against the trustee and his representatives.* *Andrews* v. *Brown*, 10 S. W. (2d) 707; *Spencer* v. *Pettit*, 17 S. W. (2d) 1102; *Continental National Bank* v. *Weems*, 6 S. W. 802; *Eaton* v. *Husted*, 172 S. W. (2d) 493; *Logan* v. *Logan*, 156 S. W. (2d) 507; *Davila* v. *Salas*, 178 S. W. (2d) 294. The same presumption *in the beneficiary's favor* is indulged *against the trustee* who has commingled trust funds with his individually owned assets. *Chanowsky* v. *Friedman*, 108 S. W. (2d) 752; *Grote* v. *Service Finance Corp.*, 119 S. W. (2d) 136; *Moseley* v. *Fikes*, 126 S. W. (2d) 589; *Nettles* v. *First National Bank*, 168 S. W. (2d) 920.

The majority opinion also suggests (R. 1008) that Mrs. King's trustees were authorized by the Will to act "as though they were the owners of the property she had conveyed to them in trust," but concedes that this was subject "to the limitation that they must not act inconsistently with it." The limitation is italicized in the quoted provisions of Section III of the Will in a footnote to the majority opinion (R. 1008). Under Texas law (as under the law of other states), the trustee must become the legal "owner" of the trust property or no trust is created. *Fleck* v. *Baldwin*, 172 S. W. (2d) 975. But such "owner" is subject to all the trust obligations as set forth in the trust instrument, even if no such condition is stated therein as appears in Mrs. King's Will. *Parrish* v. *Looney*, 194 S. W. (2d) 419; *Arnold* v. *Southern Pine Lumber Co.*, 123 S. W. 1162.

Apparently the Circuit Court is of the opinion that the effect of these clauses in Mrs. King's Will is to relieve the trustees of their burden to account. But under the Texas law of trusts (as under the law of other states) a provision purporting to relieve the trustees of this burden is void as against public policy. *Kramer* v. *Sommers*, 93 S. W. (2d) 460.

Moreover, no state is more emphatic than Texas in its application of the general law of trusts that trustees may not directly benefit themselves or their wives or families by their transactions with the trust estate, no matter what exculpatory provisions the trust instrument contains. As stated in the leading case of *Slay* v. *Burnett Trust*, 180 S. W. (2d) 480, 187 S. W. (2d) 387: "It is a well-settled rule that a trustee can make no profit out of his trust," citing *Magruder* v. *Drury*, 235 U. S. 106; *U. S.* v. *Carter*, 217 U. S. 286; *Jackson* v. *Smith*, 254 U. S. 586; *Crites* v. *Prudential Ins. Co.*, 322 U. S. 408, and many Texas and other cases. See also *Kramer* v. *Sommers*, 93 S. W. (2d) 460; *Eaton* v. *Husted*, 172 S. W. (2d) 493.

But even if petitioners had the burden of proving "fraud" or "over-reaching" against the trustees, nevertheless petitioners have shown, in relation to the breaches of trust discussed in their Petition above, that they have sustained even this burden of proof in this case, by quoting and relying exclusively upon the findings of fact made by the Master and confirmed by the trial judge. In other words, petitioners have in truth sustained this very "burden of proof" which the majority opinion of the Circuit Court erroneously casts upon them, in defiance of the Texas law of trusts.

III.

As indicated in the Petition above (pp. 5-6), Mr. Justice Waller's dissenting opinion, in dealing with the $300,000 of so-called "executors' fees," correctly finds that the entire operation and management of Mrs. King's Trust Estate was in the hands of the trustees throughout the trust period (R. 1017). This is but another way of saying that the executors never received or disbursed any funds of Mrs. King's Estate; and in this respect the evidence, as well as the Master's findings as approved by the trial judge (R. 370, 526), completely confirms Mr. Justice Waller.

We have quoted at the foot of this brief Articles 3689 and 3690 of the Texas Revised Civil Statutes, from which it indisputably appears that Texas executors are not entitled to any "executors' fees" *except upon moneys which they may actually receive in cash and may actually disburse in cash "in the course of their administration"* (Article 3689).

Under the facts in this case, since it cannot be disputed that the executors *never did administer Mrs. King's Trust Estate and never did actually receive in cash or disburse in cash any funds in the course of such administration,* it is plain that the trustees were not entitled to pay any moneys to three of their own number as executors, it being held under Texas law that unless the executors can qualify for fees under the Texas statute they are not entitled to any executors' fees. *Dallas Joint-Land Stock Bank* v. *Maxey,* 112 S. W. (2d) 305; *Richardson* v. *McCloskey,* 261 S. W. 801.

Nor can the Texas executors claim any executors' fees upon any cash or other property which the testator had on hand at the time of the decedent's death, or upon any money received from the sale of property or its disbursement "to

the heirs and legatees as such." This is the clear effect of Article 3690 of the Texas Statute. Actually, in the case at bar, the executors never did receive any cash owned by Mrs. King at her death or disburse any cash to the heirs and legatees as such. Indeed, Mr. Justice Waller clearly shows in his dissenting opinion (R. 1017) that the actions performed by the executors were "restricted to probating and recording the Will, filing the inventory and appraisement, and list of claims." It is not surprising that Mr. Justice Waller felt that $300,000 was "greatly excessive in view of the provisions of the Will, the narrowness of their duties, and the compensation received by them as trustees and as employees of the Trust Estate" (R. 1017).

Under Articles 3689-90 of the Texas Revised Civil Statutes, it is a practical impossibility that executors' fees in Texas should ever be a "round amount" such as $300,000, since such fees are invariably based upon a computation of 5% of actual receipts and disbursements by the executors. It is not surprising, therefore, that Mr. Justice Waller was impressed by the fact (R. 1017) that the executors in their sworn Federal estate tax return only "claimed as fees to the executors the sum of $110,394.39," and that "The addition of the sum of $189,605.61 seems to be somewhat of an afterthought."

But it is unnecessary to comment further on this subject, in the light of what is said above. Plainly the Circuit Court has failed to apply the Texas law to this issue, as embodied both in the Texas statutes and in the Texas law of trusts.

IV.

As indicated in the Petition above (p. 8), the trustees expended $451,115.81 for "new improvements" on 30,439.23

acres of land owned by Mrs. Alice G. K. Kleberg, known as the Santa Gertrudis Headquarters Ranch (and on certain adjacent ranch lands owned by the Trust Estate); and $91,499.40 for "new improvements" on lands owned by Robert J. Kleberg, Jr. Neither the Santa Gertrudis Headquarters Ranch nor the lands owned by Robert J. Kleberg, Jr. were owned by the Trust Estate.

It has always been the law of Texas that trustees may not improve their individually owned real properties with trust funds. *Smith* v. *Green*, 243 S. W. 1006; *Miller* v. *Himebaugh*, 153 S. W. 338; *Bush* v. *Gaffney*, 84 S. W. 759; and *Nagle* v. *Von Rosenberg*, 119 S. W. 706. If *Slay* v. *Burnett Trust*, 187 S. W. (2d) 377, is the law of Texas (as enunciated by its Supreme Court in 1945), as must be conclusively presumed in the Federal Courts, then the trustees are liable for these benefits or "profits" received by them from their Trust Estate, regardless of their "good faith" or any powers or provisions contained in Mrs. King's Will.

The District and Circuit Courts failed in this case to apply the law of Texas to these breaches of trust.

V.

As indicated in the Petition above (p. 9), the trustees paid the "living expenses" of Mrs. Alice G. K. Kleberg and part of the "living expenses" of three of the trustees, and their respective families, servants, guests and friends, and charged the same to expense accounts from which these "living expenses" could not be "segregated," totaling more than $1,000,000.

Under the Texas law of trusts as confirmed in *Slay* v. *Burnett*, 187 S. W. (2d) 377, the trustees are liable for these benefits or profits received by them, regardless of their

good faith or any of their powers granted them under the Will.

In so far as the trustees failed to segregate these improper disbursements for living expenses, under Texas law of trusts the trustees are held liable for the total of such accounts to which the improper disbursements have been charged from which they cannot be segregated. *White* v. *White,* 25 S. W. (2d) 826; *Maxwell's Unknown Heirs* v. *Bolding,* 36 S. W. (2d) 267; *Alexander* v. *Soloman,* 15 S. W. 906; *Dodson* v. *Watson,* 220 S. W. 771. The latter case holds that all doubts on an accounting are to be resolved against the trustees. See also *Arnold* v. *Southern Pine Lumber Co.,* 123 S. W. 1162, and *Watson* v. *Dodson,* 143 S. W. 329, holding that trustees owe the duty to their beneficiaries to render a fully detailed and explanatory account of their receipts and disbursements, as well as of the property on hand at the end of the trust.

It is perhaps worth noting that the Master also found (R. 365) and the trial court confirmed (R. 526) that Robert J. Kleberg, Jr. repaid to the Trust Estate "one-half of the cost of the food and wages of servants employed" by him. This constituted an admission by one of the trustees that he was not entitled to receive all of his living expenses, on top of all of the other compensation which he received from the Trust Estate.

The District and Circuit Courts failed to apply the trust law of Texas to these breaches of trust.

VI.

As indicated in the Petition above (p. 11), the trustees paid $480,855.13 from trust funds to Robert J. Kleberg, Jr. as "rental" on lands owned by him. Part of this

rent was claimed by the trustees to be paid under a written lease between Mrs. King and Robert J. Kleberg, Jr. which expired on June 30, 1934; but the Master three times found (R. 385-6, 389) and the trial judge confirmed (R. 526, 530) that it was the trustees and not Mrs. King who had leased the Encino Ranch from Robert J. Kleberg, Jr. In any event, it was undenied that there was no written lease on the Stillman Ranch; and there was no written lease on the Encino Ranch during the last nine months of the trust period, during which the trustees paid Robert J. Kleberg, Jr. the sum of $36,536.06 as alleged "rental" thereon.

Under Articles 1288 and 3995 of the Texas Revised Civil Statutes, oral leases of lands for more than one year are not enforcible. The Texas cases fully sustain this interpretation of the statute. *Dority* v. *Dority*, 71 S. W. 951; *Vaughn* v. *Pearce*, 153 S. W. 171; *Hooks* v. *Bridgewater*, 229 S. W. 1114; *Ward* v. *Etier*, 251 S. W. 1028; *Long* v. *Collins*, 12 S. W. (2d) 252; *Clark* v. *Jones*, 164 S. W. (2d) 62.

Moreover, under the Texas law of trusts, trustees may not lease the privately owned lands of themselves or their families at a rental "profit" to themselves without breaching their trust especially where, as in the case of Mrs. King's Will, there is no power in the Will permitting the trustees to lease the lands of others. *Dial* v. *Dial*, 21 Tex. 529; *Merriman* v. *Russell*, 39 Tex. 278; *Ingenhuett* v. *Hunt*, 39 S. W. 310; *Nagle* v. *Von Rosenberg*, 119 S. W. 706; *Miller* v. *Himebaugh*, 153 S. W. 338; *D. Sullivan & Co.*, v. *Ramsey*, 155 S. W. 580; *Witherspoon-McMullen Co.* v. *North Texas Trust Co.*, 212 S. W. 278; *Murphy-Bolanz Land & Loan Co.* v. *McKibbon*, 236 S. W. 78; *Graham* v. *Oakes*, 32 S. W. (2d) 916; *McMullen* v. *Sims*, 37 S. W. (2d) 141. All of these cases are similar instances in which the Texas courts have affirmed the doctrine of *Slay* v. *Burnett Trust*,

187 S. W. (2d) 377. The District and Circuit Courts failed to apply the Texas law to these breaches of trust.

VII.

As indicated in the Petition above (p. 12), the trustees purchased real property from Kingsville Land and Investment Company, a Texas corporation, whose entire capital stock was owned by two of the trustees.

This Court will find Article 7425 b-12, of the Texas Revised Civil Statutes in the Appendix to this Brief. It is there provided that Texas trustees may not purchase their individually owned properties, nor enter into any such transaction in which they have a personal interest. This is a codification in 1945 of the earlier Texas law of trusts. *Daniel* v. *Henderson*, 183 S. W. (2d) 242.

Moreover, under the Texas law of trusts trustees may not purchase real property from themselves or from any corporation already owned or controlled by them without thereby breaching their trust. *DeEverett* v. *Henry*, 3 S. W. 566; *Gaston & Thomas* v. *Dashiell*, 55 Tex. 508; *Sullivan* v. *Fant*, 160 S. W. 612.

The District and Circuit Courts failed to apply the Texas statutes and trust law to this breach of trust.

VIII.

As indicated in the Petition above (p. 13), the trustees made charitable, political and wedding gifts of trust funds, including political contributions to elect their chosen candidates as governors of Texas and to defeat the election of President Hoover. They also paid one of their own number, Robert J. Kleberg, Jr., a "wedding present" of $2,500 out of trust funds.

It is unnecessary to cite more than the case of *Slay* v. *Burnett Trust,* 187 S. W. (2d) 377, and cases therein cited, to establish that the District and Circuit Courts have failed to apply the Texas law of trusts to these "donations" and "gifts," which constituted breaches of trust under Mrs. King's Will.

IX.

As indicated in the Petition above (p. 14), the trustees failed to collect the indebtedness of $306,209.33 due Mrs. King and her Trust Estate from the Estate of Richard King, Sr.

Under the Texas law of trusts, it is a breach of trust for trustees not to collect all claims due the Trust Estate. This is especially true of all indebtedness which is due from one of the trustees or which is collectible from property held by one of the trustees. *Hemman* v. *Hemman,* 251 S. W. 313.

The District and Circuit Courts failed to apply the Texas law of trusts to this breach of trust.

X.

As indicated in the Petition above (p. 17), the trustees failed to collect 90% of the sum of $499,101.13 which the trustees paid from trust funds to make good the losses of the Kleberg Bank partnership, in which Mrs. King and her Trust Estate had only a 10% interest. The Master found that three of the trustees, who were co-partners with Mrs. King at the time of her death and at the time the losses occurred, were liable for their share of these losses, and that recovery could have been had from them, but that the trustees failed to secure any contribution either from

themselves or from any of the other members of the partnership.

Under the Texas law of partnership, the death of a partner (Mrs. King) terminates the partnership. *Altgelt* v. *Alamo Natl. Bank*, 98 Tex. 252. (Under Paragraph 14, the Articles of Partnership of Kleberg Bank likewise provided that the death of any partner should terminate the partnership) (Pl. Ex. 64; Def. Ex. 41). And under Texas partnership law, as well as under the partnership articles, Mrs. King's trustees were entitled to contribution for 90% of all partnership losses paid by them, from the other partners. *Fowler Commission Co.* v. *Charles Land & Co.*, 248 S. W. 314; *Chalk* v. *Collier*, 208 S. W. 972.

The trustees of Mrs. King's Trust Estate, however, made no effort to liquidate Mrs. King's interest in the partnership, but continued to operate the partnership for the next 9-1/2 years after her death, during which period they and the other partners borrowed $832,030.52 on their personal loans from the Bank, which loans caused the Bank's insolvency in November, 1934.

Under the Texas law of trusts above cited, it is plain that the trustees breached their trust in failing to collect 90% of the loss suffered by Mrs. King's Trust Estate of $499,101.13, under their right of contribution from the 90% holders of the other partnership interests in the partnership.

The District and Circuit Courts failed to apply the Texas law of trusts to this breach of trust.

For other breaches of trust under the Texas law of trusts see the Petition for Rehearing filed in the Circuit Court (R. 1019-1101).

CONCLUSION

We conclude, therefore, that the District and Circuit Courts in this case have failed to apply the Texas statutes and the Texas law of trusts to the breaches of trust by the trustees of Mrs. King's Trust Estate, and that such failure is in contravention of the Federal Rules of Decision Act embodied in Section 725 of the Judicial Code and the many decisions of this Court requiring the Federal Courts to apply the state statutes and state law to diversity cases.

Moreover, we submit that under Rule 38 (5) (b) of this Court, a writ of *certiorari* should properly be granted, in view of the plain violation of the state statutes and state law by the District and Circuit Courts in this case.

We particularly feel that this Court should grant *certiorari* in this case in the light of the dissenting opinion of Mr. Justice Waller, which shows that he disapproved of the trustees' accounts on an item of $300,000 of so-called "executors' fees." Both he and the majority members of the Circuit Court apparently failed to give due consideration to, and on the contrary wholly ignored, the Texas Civil Revised Statutes which, we submit, should have absolutely precluded an affirmance of the decree in the trial court.

Respectfully submitted,

BRADY COLE,
Counsel for Petitioners.

Thomas H. Fisher,
Of Counsel.

APPENDIX.

Texas Revised Civil Statutes.

"**Article 3689. Commission.**—Executors and administrators shall be entitled to receive and may retain in their hands five per cent on all sums they may actually receive in cash, and the same per cent on all sums they may pay out in cash in the course of their administration. [Acts 1876, p. 126; G. L. Vol. 8, p. 961.]

"**Art. 3690. No commissions.**—A commission shall not be allowed or received for receiving any cash which was on hand at the time of the death of the testator or intestate, nor a commission for receiving money realized from the sale of property to satisfy debts against the property and the paying out of the proceeds in satisfaction of the debt except as to the amount realized from the sale in excess of the debt, nor for paying out money to the heirs or legatees as such. Provided, however, that if the administrator or executor shows to the court that the value of the services rendered the estate in making a sale of property securing a debt exceeds the amount of the commission calculated as above provided, then the court shall allow a commission for a just amount. The amount not to exceed that now allowed by law. (Acts 1876, p. 126; G. L. vol. 8, p. 961; Acts 1931, 42nd Leg., p. 390, ch. 235, § 1.)"

"**Article 1288. Instrument of conveyance.**—No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one

to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing. [Act Feb. 5, 1840; P. D. 671; G. L. vol. 2, p. 327.]"

"**Art. 3995. Writing required.**—No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

• • •

"4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

"5. Upon any agreement which is not to be performed within the space of one year from the making thereof. [Acts 1840, p. 28; P. D. 3875; G. L. vol. 2, p. 202.]"

"**Art. 7425b-12. Trustee buying from or selling to self.** A trustee shall not buy nor sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee, or of an affiliate; or from or to himself, a relative, employer, partner or other business associate; provided a national banking association, or a state chartered bank and trust company, or a state chartered trust company, or a state chartered bank having trust powers, or any other state chartered corporation having the right to exercise trust powers, when acting or serving as executor, administrator, guardian, trustee, or receiver, may sell shares of the capital stock of itself so owned or held by itself, for any estate,

to one or more of its officers, stockholders or directors, upon a court of competent jurisdiction finding that any such sale will be to the best interest of the estate owning such shares; fixing or approving the price to be paid therefor, and the terms of sale, and upon entering an order, decree or judgment, authorizing, approving and directing such sale to be made; and provided further that a corporate trustee, executor, administrator, or guardian, when authorized by will, trust agreement, other trust instrument, or judicial order, to retain its own capital stock in trust, may exercise rights to purchase its own stock when increases in its capital stock are offered pro rata to stockholders; provided, moreover, that such exercise of rights, in the circumstances then prevailing, shall be consistent with the judgment and care which men of ordinary prudence exercise in the management of their own affairs. As amended Acts 1945, 49th Leg., p. 109, ch. 77, §4."

"**Art. 3716. In actions by or against executors, etc.**—In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent. [Id. P. D. 6827.]"